81-5082

NO. _____

RECEIVED
JUL 17 1981
Office Of The Clerk
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1981

FRANK . PERKINS,

PETITIONER,

-vs-

ROBERT R. RAINES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK L. PERKINS
P.O. Box B-36916
Florence, Arizona 85232

Petitioner - Propria Personam

QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioner, Mr. Perkins, suffer double punishment as a result of the sentencing court, after revoking a seven (7) year probation upon which Mr. Perkins had been sentenced to sixty (60) days in prison when the sentencing court imposed sentences of 15 to 20 years imprisonment of each of five counts of unlawful sale of narcotic, sentences to run concurrently and two 15 to 20 year sentences for unlawful transportation to run concurrently, but consecutive to the setences imposed for unlawful sale of narcotic?

2. Did the trial impose a statutorily unauthorized sentence by sentencing the Petitioner to 15 year minimums, the defendant having no prior convictions?

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1. The second sentence imposed after the trial court revoked Petitioner's seven year probation exceeded the partially served seven year probation, sixty days of which were served in prison. The law is that once sentence has been partially served, separate and different punishments are not authorized. 5th Amend., U.S.C.A. State v. Nicholos (1976) 26 Ariz.App. 455.....

2. The sentence imposed upon petitioner's seven year probation being revoked is statutorily unauthorized. The applicable sentencing statute is A.R.S. Section 36-1002.02(A). For a person not having been previously convicted, the statute authorizes a minimum sentence of five (5) years. Petitioner is currently serving a fifteen (15) year minimum, a violation of Due Process of Law, 5th Amend., U.S.C.A. Hicks v. Oklahoma ___U.S.___, 100 S.Ct. _____, 65 L.Ed. 2d 175 (1980).....

CONCLUSION.....

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APPENDIX B Court of Appeals Order Denying Petitioner's Motion for Reconsideration.....

APPENDIX C Excerpt Copy, Ariz. Rev. Stat., Section 36-1002.02.....

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CASES:

State v. Nicholos, (1976) 26 Ariz.App. 455

Hicks v. Oklahoma, ____U.S.____, 100 U.S._____, 65 L.Ed.2d 175 (1980)

STATUTES:

Ariz. REv. Stat., Section 36-1002.02

OPINION BELOW

The Writ of Certiorari petitioned for herin is to review the correctness of an order of the United States Court of Appeals for the Ninth Circuit, rendered May 20, 1981, a copy of said order being attached as Appendix "A", incorporated herein by reference thereto. The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's motion for reconsideration of Appeals Court order attached as Appendix "B", incorporated herein by reference thereto, denying the Petitioner's request for a Certificate of Probable Cause was based upon citations of Pickettt v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978) and United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979) affirming the United States District Court order dismissing Petitioner's 2254 Habeas claim of being incarcerated upon an illegally imposed sentence constituting double punishment.

JURISDICTION

The Jurisdiction of the Court to grant this petition and issue the writ requested is contained in 28 U.S.C.A. Section 2109.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "...no person shall...be deprived of life, liberty or property, without due process of law....
>
> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

On April 13, 1977, Pima County Superior Court Judge, the Honorable Alice Truman, entered judgements of guilt against Petitioner, Mr. Perkins, for five counts of unlawful sale of narcotics and two counts of unlawful transportation of narcotics. The court suspended imposition of sentence, and placed Petitioner of probation for a period of 7 years. The court also imposed a sentence to prison for a period of 60 days, as required by Ariz. Rev. Stat., Section 36-1002.02(F), copy excerpt attached as Appendix "C", incorporated herein by reference thereto.

Petitioner was subsequently found to be in violation of the terms of his probation. On October 13, 1978, the trial court revoked Petitioner's probation and sentenced him to 15 to 20 years on each of the five counts of unlawful sale of narcotics, with sentences to run concurrently. The court also sentenced Petitioner to 15 to 20 years on each of the two counts of unlawful transportation of narcotics, with sentences to run consecutively to the sentences imposed for unlawful sale of narcotic. Petitioner appealed from the order revoking probation and the sentence imposed. The Arizona Court of Appeals, Division Two, affirmed the order and sentences in a memorandum decision filed May 8, 1979, attached as Appendix "D", incorporated herein by reference thereto.

On January 9, 1980 Petitioner filed a petition for post-conviction relief in the trial court, alledging a violation of his 14th Amendment rights. The court dismissed the petition on April 7, 1980. On September 15, 1980, Petitioner filed a Petition for Writ of Habeas Corpus in the Arizona Supreme Court, claiming an illegally imposed sentence; said petition was denied October 7, 1980, attached as Appendix "E", incorporated herein by reference thereto.

On November 19, 1980 Petitioner filed in the United States District Court pursuant to Title 28, Section 2254 U.S.C.A., a Habeas complaint with affidavit to proceed in Forma Pauperis and motion for appointment of counsel, attached as Appendix "F", incorporated herein by reference thereto. Based upon magistrate recommendation, attached as Appendix "G", incorporated herein by reference thereto, the U.S. District Court dismissed Petitioner's Habeas application, attached as Appendix "H", incorporated herein by reference thereto. Petitioner filed petition for rehearing, attached as Appendix "I", incorporated herein by reference thereto. Petitioner's motion for rehearing was denied by the United States District Court in its order filed March 3, 1981. attached as Appendix "J", incorporated herein by reference thereto. Petitioner filed notice of appeal March 9, 1981, attached as Appendix "K", incorporated herein by reference thereto. Prior to Petitioner's filing in United States District Court an application for Certificate of Probable Cause, the United States District Court filed a refusal to issue a Certificate of Probable Cause on March 17, 1981, attached as Appendix "L", incorporated herein by reference thereto. Petitioner's subsequent application for Certificate of Probable Cause to the United States District Court dated March 16, 1981, not ruled upon by the United States District Court, attached as Appendix "M", incorporated herein by reference thereto. Petitioner subsequently filed an application for Certificate of Probable Cause in the United States Court of

Appeals for the Ninth Circuit, attached as Appendix "N", incorporated herein by reference thereto. The United States Court of Appeals for the Ninth Circuit denied Petitioner's Application for Certificate of Probable Cause May 5, 1981, attached as Appendix "A", incorporated herein by reference thereto. Petitioner subsequently filed a petition for rehearing, denied May 20, 1981, attached as Appendix "B", incorporated herein by reference thereto. Reasons for granting the writ:

1. The second sentence imposed after the trial court revoked Petitioner's seven year probation exceeded the partially served sentence of seven year probation, sixty days of which were spent in Arizona State Prison. The law is that once sentence has been partially served, separate and different punishments are not authorized. Fifth Amendment to the United States Constitution. State v. Nocholos, (1976) 26 Ariz. App. 455.

2. The setence imposed upon Petitioner's probation being revoked is statutorily unauthorized. Under the applicable Arizona sentencing statute, A.R.S. Section 36-1002.02, a person having no previous convictions, authorizeds under subsection (A) a minimum of five years. Petitioner was sentenced to and is currently serving an unauthorized mimimum of fifteen years, in violation of Due Process of Law, Amend. 5, U.S.C.A. Hicks v. Oklahoma, ___U.S.___, 100 S.Ct._____, 65 L.Ed.2d 175 (1980).

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgement of the United States Court of Appeals.

Respectfully submitted,

Frank L Perkins

FRANK L. PERKINS, Petitioner
P.O. Box B-36916
Florence, Arizona 85232

BENNY DIXON, Jail House Lawyer
prison no. 27498

SUBSCRIBED ANS SWORN TO BEFORE ME THIS 14th DAY OF JULY, 1931

Michael A. Chernetsky
NOTARY PUBLIC

My Commission Expires Jan. 27, 1985
My Commission Expires

One copy mailed to:

Clerk, United States Supreme Court

FILED
MAY 5 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____

17

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
APR 29 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

FRANK L. PERKINS,

Petitioner,

v.

ROBERT R. RAINES,

Respondent.

No. 81-8034

DC# 80-965 PHX-CLH
Arizona (Phoenix)

ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges

The court has carefully reviewed the application for certificate of probable cause and concludes it does not present a substantial question. The application is therefore denied. Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977).

CR CAL 4/13/81

cc:
5th CCA
Court Reporter
Federal Defender
US Attorney
US Magistrate
Marshal
Probation
Counsel _____

S70 Fees Paid

Appendix-A

Appendix A

FILED

MAY 20 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK L. PERKINS, Petitoner, vs. ROBERT R. RAINES, Respondent.	No. 81-8034 DC# 80-965 PHX CLH Arizona (Phoenix) ORDER

Before: BROWNING and BOOCHEVER, Circuit Judges

The court, in denying a Certificate of Probable Cause, reviewed all pleadings and documents contained in the district court file, including petitioner's objections to the magistrate's report and recommendation. The court concluded that the "double punishment" argument being raised was without merit. See Pickett v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978); United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979). Accordingly, the petition for rehearing, received May 13, 1981, is denied. No further motions for reconsideration will be entertained.

5/18/81

CR CAL 4/13/81

Appendix - B

Exhibit - A

ARIZONA
LEGISLATIVE SERVICE
1976

Thirty-Second Legislature

Second Regular Session

Convened January 12, 1976

Adjourned June 24, 1976

Chapters 111 to 185 [End]

TABLES AND INDEX

ST. PAUL, MINN.
WEST PUBLISHING CO.

Appendix - C

Exhibit - [redacted]

§ 36-1002.02. Import and transport of narcotic drugs; sales and traffic in narcotic drugs; penalty; probation or suspension of sentence prohibited

A. Except as otherwise provided in this article, every person who transports, imports into this state, sells, furnishes, administers or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any narcotic drug other than marijuana except upon the written prescription of a physician, osteopath, dentist, or veterinarian licensed to practice in this state shall be punished by imprisonment in the state prison from five years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

B. If such a person has been previously convicted once of any felony offense described in this article, or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in a state prison from ten years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than ten years in prison.

Changes or additions in text are indicated by underline

C. If such a person has been previously convicted two or more times of any felony offense described in this article, or has been previously convicted two or more times of any offense under the laws of any other state or of the United States which if committed in this state would have been punishable as a felony offense described in this article, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from fifteen years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than fifteen years in prison.

D. In no case shall any person who was of the age of eighteen years or over at the time of the commission of the offense be granted probation by the trial court, nor shall the execution of the sentence imposed on such a person be suspended, nor shall the imposition of sentence be suspended if such person is convicted of a violation of the provisions of this section involving an amount of one or more drugs, other than marijuana, having a value of not less than two hundred fifty dollars, or was previously convicted of any felony offense described in this article, or has been previously convicted once of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a felony offense described in this article.

E. Any person placed on probation under this section who, as a condition of probation, is required to submit to a periodic urinalysis screening and who fails such urinalysis screening shall have such probation immediately revoked upon a hearing by the court provided that such probation shall not be revoked if the failure of the urinalysis screening is due solely to the influence of medication prescribed by a physician or to participating in an approved methadone maintenance program.

F. Any person convicted of a violation of this section who is placed on probation in accordance with the terms of this section shall upon sentencing, be committed to the department of corrections for a period of not less than thirty nor more than sixty days.

Approved by the Governor, June 23, 1976.

Filed in the Office of the Secretary of State, June 25, 1976.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED
MAY 8 1979
CLERK COURT OF APPEALS
Division Two

THE STATE OF ARIZONA, Appellee, v. FRANK L. PERKINS, Appellant.	)	ORDER 2 CA-CR 1649 (PIMA County Superior Court Cause No. A-31397)

22-20C Jarrett

The Honorable Robert K. Corbin, The Attorney General, State of Arizona, Phoenix; by William J. Schafer III and Barbara A. Jarrett, Assistant Attorneys General,

Attorneys for Appellee.

Norman R. Freeman, Esq., Tucson,

Attorney for Appellant.

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk, and, under the Rules of Criminal Procedure, Rule 31.18, Arizona Revised Statutes, fifteen days are allowed after service of the decision to file a Motion for Rehearing.

IT IS FURTHER ORDERED that a copy of this Order, together with a copy of the Memorandum Decision, be sent to each party appearing or the attorney for such party and to The Honorable Alice Truman, Judge.

Dated: May 8, 1979.

James L. Richmond, Chief Judge.

Copies mailed as directed
this 8 day of May,
1979.

Elizabeth Urwin Fritz, Clerk.

Appendix - D

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
Phoenix 85007

TELEPHONE
255-4536

October 14, 1980

Frank L. Perkins
P. O. Box B-36916
Florence, Arizona 85232

Re: FRANK L. PERKINS v. ELLIS McDOUGALL/ROBERT RAINES
Supreme Court No. H-804
Pima County No. CR-A31397

Dear Mr. Perkins:

Your Motion for Extension of Time to file a reply is moot, inasmuch as the matter was before the Court on the 7th day of October.

Very truly yours,

Maryann Hopkins-Young

Maryann Hopkins-Young, Clerk

MHY/alc
Enclosure: Copy of Order of October 7, 1980

Appendix - E

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
Phoenix 85007

TELEPHONE
255-4536

October 14, 1980

Frank L. Perkins
P. O. Box B-36916
Florence, Arizona 85232

Re: FRANK L. PERKINS v. ELLIS
McDOUGALL/ROBERT RAINES
Supreme Court No. H-804
Pima County No. CR-A31397

Dear Mr. Perkins:

Your Motion for Extension of Time to file a reply is moot, inasmuch as the matter was before the Court on the 7th day of October.

Very truly yours,

Maryann Hopkins-Young

Maryann Hopkins-Young, Clerk

MHY/alc
Enclosure: Copy of Order of October 7, 1980

Appendix - E

(5)

Exhibit - S

FILED

DEC 29 1990

CLERK U.S. DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRANK L. PERKINS

Petitioner

v.

ROBERT R. RAINES

Respondent

CIV 80-965 PHX CLH-RCG

RECOMMENDATION

* * * * * * * * * * * * * * * * * * *

TO THE HONORABLE CHARLES L. HARDY, JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA.

The above-entitled matter was referred to the United States Magistrate for review and recommendation pursuant to Rules 17 and 18 of the Rules of Practice, United States District Court for the District of Arizona.

Petitioner seeks habeas corpus relief. On April 30, 1977, the petitioner, having been found guilty of unlawful sale and transportation of narcotics, was placed on probation for a period of seven years and a condition of said probation provided for incarceration at the Arizona State Prison for a period of sixty days. On October 13, 1978 following a petition for revocation of probation, the petitioner was sentenced to fifteen to twenty years on the unlawful sale of narcotics and a similar sentence on the charge of unlawful transportation. The present petition alleges that this constituted double punishment and was constitutionally invalid. The State of Arizona has filed a response alleging that this particular allegation was not previously raised in state court.

The petition therefore would be premature and subject to dismissal under Carothers v. Rhay, 594 F.2d 225 (9 C.A. 1979). However, in the opinion of this Court, it would be futile to dismiss the petition on that ground inasmuch as the allegation raised is totally devoid of merit. Arizona Revised Statute 36-1002.02(C) makes a period of incarceration

mandatory when placing a person convicted of a narcotics offense pursuant to this statute. The Arizona Supreme Court in Pickett v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978) has held that incarceration as a part of probation is not a sentence to confinement, but is, instead, a condition of probation established at the time sentence is suspended. See also, State v. Valenzuela, 116 Ariz. 61, 567 P.2d 1190 (1977).

RECOMMENDATION: It is recommended that the petition be dismissed without a hearing.

DATED at Phoenix, Arizona, this 29th day of December, 1980.

Copy of the foregoing
mailed this 29th day of
December, 1980, to:

Richard C. Gormley
RICHARD C. GORMLEY
United States Magistrate

Frank L. Perkins
Box B 36916
Florence, AZ 85232

Barbara A. Jarrett
Assistant Attorney General
Second Floor, West Wing
1700 West Washington
Phoenix, AZ 85007

Jacqueline S. Moore
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE January 12, 1981

FRANK L. PERKINS,

PLAINTIFF,

vs.

ROBERT R. RAINES

DEFENDANT.

No. CIV 80-965 PHX CLH

COPY
OF
ORIGINAL FILED ON THIS DATE
JAN 12 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Court having considered Petitioner's Application for Writ of Habeas Corpus, and the Magistrate's Recommendation, IT IS ORDERED approving the Magistrate's Recommendation.

IT IS FURTHER ORDERED dismissing the application.

Exhibit - [redacted]

cc: all counsel of record

CHARLES L. HARDY
United States District Judge

Appendix - H

AO 72 (Rev. 8/82)

JUDGMENT ON DECISION BY THE COURT

FILED (63)

JAN 13 1981

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____ DEPUTY CLERK

United States District Court

FOR THE

DISTRICT OF ARIZONA

CIVIL ACTION FILE NO. 80-965-PHX-CLH

FRANK L. PERKINS,

vs.

ROBERT R. RAINES, et al.

JUDGMENT

This action came on for ~~xxxx~~ (hearing) before the Court, Honorable Charles L. Hardy, United States District Judge, presiding, and the issues having been duly ~~xxxx~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiff take nothing and the action is hereby dismissed.

Dated at Phoenix, Arizona, this 13th day of January, 19 81.

W. J. FURSTENAU
Clerk of Court

By _____
Deputy Clerk

Appendix - H-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE February 26, 1981

FRANK L. PERKINS,

PLAINTIFF,

vs.

No. CIV80-965 PHX CLH

ROBERT R. RAINER,

DEFENDANT.

J

IT IS ORDERED denying petitioner's motion for rehearing.

COPY
OF
ORIGINAL FILED ON THIS DATE
MAR 3 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CHARLES L. HARDY
United States District Judge

cc: all counsel of record

Appendix - J

FILED

MAR 17 1981

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

L

FRANK L. PERKINS,

Petitioner,

vs.

ROBERT R. RAINES,

Respondent.

No. CIV 80-965 PHX CLH

REFUSAL TO ISSUE CERTIFICATE OF PROBABLE CAUSE

The petitioner has appealed from an order of this Court dismissing his petition for habeas corpus relief and denying a motion for rehearing. Where an appeal is taken in a habeas corpus proceeding Rule 22(b), Rules of Appellate Procedure, require the Judge who rendered the judgment to "either issue a certificate of probable cause or state the reasons why such a certificate should not issue."

A certificate of probable cause should not issue in this case because the appeal is frivolous.

On April 13, 1977 the petitioner was adjudged guilty by the Superior Court of Arizona of five counts of unlawful sale of narcotics and two counts of unlawful transportation of narcotics. Imposition of sentence was suspended and he was placed on probation for a period of seven years. The Court's judgment also recited:

> "IT IS FURTHER ORDERED that the defendant be committed to the Department of Corrections for a period of sixty (60) days.
>
> "In imposing sentence, the Court has considered the time the defendant spent in the Pima County Jail."

On October 13, 1978 the petitioner's probation was revoked and he was sentenced to prison for from 15 to 20 years on each of the five counts of unlawful sale of narcotics, which were to run concurrently, and for 15 to 20 years on each of the two counts of unlawful transportation of narcotics, each of which were to run concurrently with each other but consecutive to the sentences imposed for

Appendix - L

unlawful sale. The petitioner now contends that he has been subjected to double jeopardy in violation of the Fifth Amendment.

In Arizona a person who has been convicted of unlawful sale of narcotics and who is placed on probation must be committed to the Department of Corrections for not less than 30 nor more than 60 days. A.R.S. 36-1002.02C (supp.). The Arizona Supreme Court has held that incarceration as a part of probation is not a sentence to confinement but is, instead, a condition of probation established at the time sentence is suspended. Pickett v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978) cf, United States v. DiFrancesco, _____U.S._____, 101 S. Ct. 426 (1980).

IT IS ORDERED denying certificate of probable cause.

DATED this 16 day of March, 1981.

Charles L. Hardy

CHARLES L. HARDY
Judge of the United States District Court

cc: all counsel of record

ORIGINAL

RECEIVED
AUG 17 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-5082

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

FRANK PERKINS,

Petitioner,

-vs-

ROBERT R. RAINES,

Respondent,

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

CRANE McCLENNEN
Assistant Attorney General

BARBARA A. JARRETT
Assistant Attorney General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENT

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NO. 81-5082

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

FRANK PERKINS,

Petitioner,

-vs-

ROBERT R. RAINES,

Respondent,

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONSE TO PETITION FOR

WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the circuit court abuse its discretion in denying petitioner's application for a certificate of probable cause?

2. Does this court have jurisdiction to grant petitioner's petition for writ of certiorari?

STATEMENT OF THE CASE

Petitioner was charged by indictment in Cause No. A-31397 in Pima County Superior Court, State of Arizona, with five counts of unlawful sale of narcotics, and with two counts of unlawful transportation of narcotics. Following a jury trial, petitioner was found guilty of all charges. On April 13, 1977, the trial court suspended imposition of sentence, and placed petitioner on probation for a period of 7 years.

Petitioner was arrested on August 4, 1978, and was charged with burglary and grand theft. On August 15, 1978, petitioner's probation officer filed a petition to revoke probation, alleging that petitioner had violated the conditions of his probation by: (1) being arrested for burglary and grand theft, (2) associating with Ronald Barrows, (3) failing to inform the probation officer that he had changed his address, and (4) failing to report to the probation officer each month.

At his initial appearance on August 21, 1978, petitioner entered a denial of the allegations of the petition to revoke probation. At the evidentiary hearing, however, petitioner admitted allegations numbers 2, 3, and 4 of the petition. In exchange for petitioner's admissions, the state agreed to dismiss the burglary and grand theft charges pending against petitioner. The trial court accepted petitioner's admissions and ordered that his probation be revoked.

On October 13, 1978, the trial court sentenced petitioner to 15 to 20 years on each of the five counts of unlawful sale of narcotics, sentences to run concurrently. The court also sentenced petitioner to 15 to 20 years on each of the two counts of unlawful transportation,

sentences to run concurrently with each other, but consecutive to the sentences imposed for unlawful sale.

Petitioner appealed from the revocation of his probation, and the sentences he received, to Division Two of the Arizona Court of Appeals. On appeal, he claimed that he was prejudiced by the delay in bringing him before a magistrate following his arrest, and that the sentences he received were excessive. The Court of Appeals, in a memorandum decision filed May 8, 1979, affirmed the revocation of petitioner's probation, and the sentences he had received. Petitioner filed a motion for rehearing, which was denied on June 6, 1979. He filed a petition for review in the Arizona Supreme Court, which was denied on July 11, 1979.

On January 9, 1980, petitioner filed a petition for post-conviction relief in the trial court alleging a violation of his Fourteenth Amendment rights. The trial court dismissed his petition on April 7, 1980, and petitioner did not seek review of that decision pursuant to Rule 32.9, Arizona Rules of Criminal Procedure.

On September 15, 1980, petitioner filed a petition for writ of habeas corpus in the Arizona Supreme Court. In his petition, petitioner claimed that the trial court had erred in sentencing him to 90 days at Arizona State Prison as a condition of his probation. The Arizona Supreme Court denied his petition for writ of habeas corpus on October 7, 1980.

On November 19, 1980, petitioner filed a petition for writ of habeas corpus in the United States District Court for the State of Arizona. The only issue he raised in his petition was a claim that he was being punished twice for the same offense. Respondent made a motion to dismiss the

petition on the ground that petitioner had failed to state a ground upon which relief could be granted. The district court dismissed petitioner's petition on January 12, 1981. Petitioner filed a motion for rehearing, which was denied by the district court on February 26, 1981. Petitioner filed a notice of appeal in the Court of Appeals for the Ninth Circuit. The district court refused to issue a certificate of probable cause on the ground that petitioner's appeal was frivolous. Petitioner then requested the Court of Appeals to issue a certificate of probable cause in order to allow him to appeal from the district court. On April 29, 1981, the Court of Appeals denied petitioner's application for a certificate of probable cause on the ground that it did not present a substantial question. Petitioner filed a petition for rehearing, and that petition was denied on May 20, 1981. On July 14, 1981, petitioner filed a petition for writ of certiorari in this Court.

ARGUMENTS

I

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE.

Petitioner claims that the Circuit Court erred in denying his application for a certificate of probable cause on the ground that it did not present a substantial question. Respondent submits that the Circuit Court properly denied petitioner's application because petitioner failed to raise a federal constitutional question in his petition for writ of habeas corpus in district court by his claim that he was subjected to double punishment under Arizona's narcotics laws. Matters of sentencing properly

belong within the province of the state criminal justice system, and state rules of sentencing ordinarily do not involve constitutional issues that can be reached by habeas corpus. Holmes v. Israel, 453 F.Supp. 864 (E.D.Wis. 1978). Where a sentence is within the limit set by law, its severity is not grounds for relief on habeas corpus. United States ex rel. Sluder v. Brantly, 454 F.2d 1266 (7th Cir. 1972). Petitioner failed to state a ground upon which habeas corpus relief could be granted.

Further, petitioner was not entitled to habeas relief on his claim of double punishment because his argument was devoid of merit. Petitioner argued that he was sentenced twice for his narcotics offenses. The record does not support petitioner's claim. Following his original convictions, petitioner was placed on probation. Pursuant to Ariz.Rev.Stat.Ann. § 36-1002.02(C), petitioner was committed to the Department of Corrections for a period of 60 days. The trial court had no discretion in the matter, as § 36-1002.02(C) requires a defendant convicted of a drug offense under § 36-1002, who receives probation, to be committed to the Department of Corrections for from 30 to 60 days as a condition of his probation.

The Arizona Supreme Court has approved the imposition of prison time as a condition of probation as authorized by § 36-1002.02. State v. Valenzuela, 116 Ariz. 61, 567 P.2d 1190 (1977). Petitioner argued, however, that he was "sentenced" to 60 days imprisonment, and that the sentence imposed on him following revocation of his probation was double punishment. The Arizona Supreme Court has held that incarceration as a part of probation is not a sentence to confinement, but is, instead, a condition of probation established at the time sentence is suspended. Pickett v.

Boykin, 118 Ariz. 261, 576 P.2d 120 (1978). Since petitioner did not receive two sentences, his double punishment argument was devoid of merit, and the Circuit Court properly denied his application for a certificate of probable cause.

II

THIS COURT DOES NOT HAVE JURISDICTION TO GRANT PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

Petitioner claims that this Court has jurisdiction to grant a writ of certiorari in this matter. The considerations governing review on writ of certiorari are set forth in Rule 17, Supreme Court Rules. That rule provides in pertinent part as follows:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

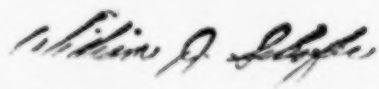
It is apparent from the above-cited rule that this Court has wide discretion in deciding whether to grant a petition for writ of certiorari. However, the court's jurisdiction arises only in cases involving a federal constitutional question. Since the issue petitioner has raised is not a federal constitutional question, this Court does not have jurisdiction in the present matter.

CONCLUSION

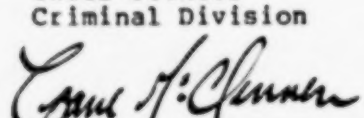
Since petitioner failed to raise a substantial federal question in district court, the circuit court did not err in denying his application for a certificate of probable cause. Moreover, this Court does not have jurisdiction in this matter because of petitioner's failure to raise a federal question. For the preceding reason, respondent respectfully requests that this Court deny petitioner's petition for writ of certiorari.

Respectfully submitted,

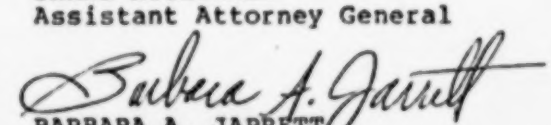
ROBERT K. CORBIN
Attorney General



WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



CRANE McCLENNEN
Assistant Attorney General



BARBARA A. JARRETT
Assistant Attorney General

Attorneys for RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRANK L. PERKINS,

PETITIONER,

-vs-

ROBERT R. RAINES,

RESPONDENT.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FRANK L. PERKINS
P.O. Box B-36916
Florence, Arizona 85232
Petitioner - Propria Personam

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Appendix

A-I, Excerpt of Sentencing Transcript, Oct. 13, 1978

CITATIONS

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United States v. Clayton, 588 F.2d 1288 (9th Cir. 1978)..... 1

State v. Wheeler, 108 Ariz. 338, 498, P.2d 205 (1972) . 2

United States v. Best, 571 F.2d 484 (9th Cir. 1978) ... 2

Sullens v. United States, 409 F.2d 545 (5th Cir. 1969) 3

State v. Watson, (1978) 120 Ariz. 441, 586 P.2d 1253 .. 3

State v. Bollander, (1975) 112 Ariz. 35, 537 P.2d 22 .. 3

Blackledge v. Perry, 417 U.S. 21 (1974) 3

Hicks v. Oklahoma, _____ U.S. _____, 100 S.Ct. _____ 65 L.Ed. 2d 175 (1980) 4

Statutes

Ariz. Rev. Stat., Sections 36-1002.02 (A) (F)

REPLY TO RESPONDENT ARGUMENT I:

The Respondent Argument Number One submits that the Circuit Court did not abuse its discretion in denying Petitioner's application for a Certificate of Probable Cause.

In reply Petitioner submits that Appendix "B" of Petitioner's Petition for Writ of Certiorari to this Court factualizes that the Circuit Court dismissal order is based upon the statement:

> "The court concluded that the double punishment argument being rnised was without merit. See Picket v. Boykin , 118 Ariz. 261, 576 P.2d 120 (1978); United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979). Accordingly, the Petition for Rehearing, received May 31, 1981, is denied. No further motions for reconsideration will be entertained."

In reply to Respondent's assertion, Petitioner respectfully submits that neither Boykin nor Clayton, citations (Id.) apply to facts of this case nor to Petitioner's factually submitted contentions claiming that his present sentence, and incarceration based upon same, constitutes double punishment violative of the Fifth, Sixth and Fourteen Amendments of the United States Constitution and the Article Ten, Section Two ban against double punishment in the Constitution of the State of Arizona.

The issue of facts dealt with in Boykin, citation (Id.), is different and does not mesh with the facts presented here. The Arizona Supreme Court held that incarceration as a part of probation is not a sentence to confinement but is, instead, a condition of probation established at the time sentence is suspended. The court went on to state that where the defendant was found to have violated his probation, the Superior Court was authorized by statute to modify the orginal conditions of probation and could require that defendant to serve a full period of incarcertaion; under such circumstances, the sheriff could not grant double time allowance. Emphasis Added. The issues are not the same, and most certainly Mr. Perkins's present sentence is not

statutorily authorized. As previously submitted, a narcotic offender who has not been previously convicted would be punishable under A.R.S. 36-1002.02(A), which authorizes a five year minimum sentence. See Appendix A-I, R.T. of hearing, October 13, 1978, incorporated herein by reference thereto. It is specifically indicated at p. 53, lines 21 through 23:

> The Court
>
> Perhaps if you had gone and served your flat five years--you realize you are facing seven possible mandatory fives.

The court clearly states that the sentence that would have been imposed by the court, had the defendant not been given probation at the orginal sentencing, would have been five years (emphasis added), which further supports Petitioner's claim of being incarcerated as a result of an illegally imposed sentence which is statutorily unauthorized enhancement, constituting double punishment. The Fifth Amendment to the United States Constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Article Two, Section Ten of the Arizona Constitution provides the same protection. Benton v. Maryland, 395 U.S. 784 (1969) provides that the United States constitutional prohibition against double jeopardy shall apply to the states. The Supreme Court in Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873) held that double jeopardy protections are violated when an individual's sentence is increased after service of his sentence has commenced. Here, by the trial court's own admission, is increasing the orginal sentence (five flat years) that the court could have imposed. In State v. Wheeler, 108 Ariz. 338, 498 P.2d 205 (1972) the Arizona Supreme Court held that double jeopardy prohibitions applied; the first sentence could not be lawfully increased. The double jeopardy prohibitions apply also in sentences involving probation. In United States v. Best, 571 F.2d 484 (9th Cir., 1978), a trial judge was made to realize that his original sentence, ordering prison and probation on three separate counts, was statutorily excessive. He then "corrected" the sentence to make the punishment for the second and third counts,

probation, to run consecutively to the prison term in one count. That would have been a lawful sentence, if first imposed. However, the Court of Appeals wrote:

> "We recognize that the district court judge could have lawfully imposed the disputed sentences at the time of initial sentencing. However, we refuse to sanction a broad rule which would allow a sentence to be changed to conform with the original intention of the sentencing judge. Such a rule would present too great a potential for abuse." P. 486.

The application of the double jeopardy provisions to a sentence of probation is again seen in Sullens v. United States, 409 F.2d 545 (5th Cir. 1969). The sentencing judge ordered Sullens to a short prison term and probation at the same time. However, the judge then learned that credit for time served would make Sullens ineligible for the "split sentencing" provision. The judge then called his first sentence improper and resentenced Sullens to a longer prison term. The Fifth Circuit Court held that increasing a sentence after a defendant has commenced to serve it is a violation of the constitutional guarantee against double jeopardy. The court held that Sullens was entitled to immediate release. Here, Mr. Perkins's initial sentence, seven years probation and sixty days in prison, upon being revoked was increased and a consecutive sentence imposed which he has to serve in the future of 15 to 20 years for unlawful transportation of narcotics. State v. Watson, (1978) 120 Ariz. 441, 586 P.2d 1253. The court held that double jeopardy applies (1) wherein individual is tried and convicted and it is sought to prosecute him again for the same or included offense, or (2) where a person has been convicted and sentenced and an attempt is then made to increase sentence. State v. Bollander, (1975) 112 Ariz. 35, 537 P.2d 22. Petitioner further respectfully submits that to prevent even the appearance of vindictiveness (prohibited under Blackledge v. Perry, 417 U.S. 21 (1974)), the trial judge must not be permitted to resentence a defendant to a higher term than originally stated.

From the trial court's own words, the original sentence the Court would have imposed was five flat years. Arizona REvised Statute 36-1002.02(F), under which Mr. Perkins's original sentence (seven years probation and sixty days in prison) would have been authorized, specifically states:

> "Any person convicted of a violation of this section shall upon sentencing be committed to the Department of Corrections for not less than thirty nor more than sixty days." (Emphasis added).

and substantiates that Mr. Perkins was in fact sentenced, and the second sentence imposed after the probation revocation was an increase of the original sentence constituting double punishment. The fact that Mr. Perkins had no previous convictions further substantiates that his present minum sentence, being fifteen years, is violative of Arizona Revised Statutes, Section 36-1002.02(A) which authorizes a minimum sentence of five years. Petitioner submits that Respondent's reply does not meet with the stated facts of Petitioner's contentions. Picket and Clayton, citations previously given, are not on point with this case.

REPLY TO RESPONDENT ARGUMENT II:

Respondent submits that this Court does not have jurisdiction to grant Petitioner's Petition for Writ of Certiorari. In reply, respectfully submitted for this Court's consideration, Petitioner states that the contentions raised herein and previously raised in both state and federal court proceedings are in harmony with the issues submitted to this Court in Hicks v. Oklahoma, ____U.S. _____, 100 S.Ct. _____, 65 L.Ed. 2d 175 (1980). The Court held that imposing punishment is not merely a matter of state procedural law, but is a liberty interest that the Fourteenth Amendment to the United States Constitution preserves against arbitrary deprivation by the state. The Petitioner, Mr. Perkins, has in fact been denied due process of law as guaranteed to him by the Fourteenth Amendment and by statute under Arizona Law, Ariz. Rev. Statutes, Section 36-1002.02. Mr. Perkins having no previous convictions, he should

have been sentenced to a minimum sentence of five years. Respondent's submissions and contentions in regards to this Court lacking jurisdiction are without merit, based upon the substantiated facts and contentions appertaining to the Petitioner's Petition for Writ of Certiorari to this Court.

CONCLUSION

Petitioner having not the ability to bring pleadings to the courts, has proceeded by trial and error, through the efforts of fellow prison resident Benny Dixon, prison no. 27498, who has no formal tutoring in law. The pleadings have continued out of conviction more than ability to intelligently and clearly argue the issues; appointment of counsel was sought in Federal District Court. Based upon same, Petitioner prays that errors in the form of the pleadings be construed liberally, that the Petition for Writ of Certiorari be granted, and moves this Court to grant such other and further relief deemed necessary and appropriate.

Respectfully submitted,

Frank L. Perkins
FRANK L. PERKINS

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1st DAY OF SEPTEMBER, 1981.

Carson O. McWilliams
NOTARY PUBLIC

My Commission Expires April 16, 1984

My Commission Expires

CERTIFICATE OF SERVICE BY MAILING

I, Frank L. Perkins, Petitioner herein, being first duly sworn, upon my oath depose and say: that I am the Petitioner in No. 81-5082, Petition for Writ of Certiorari, United States Supreme Court, and that on the 2nd day of September, 1981 I caused to be deposited in the United States Post Office, located at Arizona State Prison, Florence, Arizona, 85232, the following:

Reply to Response to Petition for Writ of Certiorari;

that (17) and (1) copy was placed in an envelope addressed to each of the following parties:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

and

Robert K. Corbin
Attorney General
c/o Barbara A. Jarrett
Assistant Attorney General
Attorneys for Respondent
State Capitol Building
West Wing -- 2nd Floor
Phoenix, Arizona 85232

Further, the Affiant saith not.

Frank L. Perkins
FRANK L. PERKINS

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1st DAY OF SEPTEMBER, 1981

Carson O. McElhaney
NOTARY PUBLIC

My Commission Expires April 16, 1984
My Commission Expires

IN THE SUPERIOR COURT OF

THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Plaintiff,

vs.

FRANK L. PERKINS,

Defendant.

NOV 8 1978
[illegible] Clerk
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No. A-31397

TRANSCRIPT OF HEARING

(Excerpt)

October 13, 1978

Appendix-A-I

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,
Plaintiff,
-vs-
FRANK L. PERKINS,
Defendant.

No. A-31397

BE IT REMEMBERED that the above-entitled cause came on regularly for further hearing, before the Honorable ALICE TRUMAN, Judge in the above-entitled court, on the 13th day of October, 1978.

APPEARANCES:

RICHARD ROLLMAN, Deputy County Attorney appearing for the Plaintiff.

NORMAN R. FREEMAN, Esq., appearing for the Defendant.

done nothing to demonstrate that he appreciated what the court did when it first sentenced him to probation or did anything to make sure that he didn't get into trouble.

He repeatedly has been in trouble and nothing has changed. I just don't think the man deserves probation.

I don't think he is the type of person that probation is intended for, and I think the probation should be terminated and he should be sentenced to prison.

THE COURT: Mr. Perkins, the court hereby terminates your probation.

I feel thatit was practically an insult to anyone's intelligence to hear your half hearted explanation of why you didn't get in touch with the probation department, why you didn't do this. People are more intelligent that that. You are not kidding me a bit. I made a big fat mistake putting you on probation in the first place. Perhaps if you had gone and served your flat five years -- you realize you are facing seven possible mandatory fives. I explained that to you when I took your allegations of guilty to these charges for revocation.

Best Copy Available

Anyone who is facing that and still thinks that I could believe the lame excuses you gave for totally ignoring your responsibility on probation, and you haven't been doing anything right since you have been on probation.

We should have had you in here a long time before. You didn't make your reports, you went to California and the court should have been advised. I have taken that up with the probation department. When one with your serious charges leaves the jurisdiction, doesn't keep in touch, we should keep closer track of you. I'm sorry we haven't.

I'm not, however, going to turn you loose on the public any longer.

I have made my mistake and you have proved it to me. You can call this an administrative violation. I call it a total disregard for your probation, total disregard and total irresponsibility and total failure to realize what the law means and what you have to do to pay your debt to society.

I'm sorry you are going to have to do it now and I don't take pleasure in making mistakes. I'm sorry you couldn't have made it

to have a consecutive fifteen to twenty on the transportation.

Those are consecutive to the first. That means you are going to serve fifteen to twenty on the first five counts and then fifteen to twenty on the last two counts, six and seven, to be served consecutively. That means you are going to do a flat ten years before you are going to be able to get out of prison.

Now, I don't do this with pleasure. I am sorry to see it happen. It is the will of the legislature and the people that when someone like you reacts the way you do on probation and to the court, they don't even take much pleasure in giving someone a chance who had the kind of record you had.

I leaned over backwards to give you a chance. It just didn't pay at all, and I am now sentencing you on the first three counts fifteen to twenty years to be served concurrently, and then on the last two counts fifteen to twenty years concurrently, but those two terms to be served consecutively to your first five.

You understand? It is a little confusing. I am not sure the defendant understands it, but you understand the outcome. The first

five counts go concurrently fifteen to twenty, so it is just like you were having one count fifteen to twenty and then another counts fifteen to twenty consecutively to that. That means you have two consecutive terms, one to be served after the others.

You are further advised that you have the right to appeal from the sentence of the court. Please take a copy of your rights. And I think in a case like this we better read them over to him.

I will read them to you.

You have the right to appeal from this proceeding. Your attorney has, no doubt, told you that and I want to besure you understand all of your rights.

You must file a notice of appeal within twenty days of the entry of judgment and sentence. That is twenty days from today. If you do not file a notice of appeal within twenty days you will lose your right to appeal.

The entry of judgment and sentence occurs at the time of sentencing. It is occurri right now, so you have twenty days from today.

If you do not appeal you may not ever another opportunity to have any errors made in th

on probation.

You lied to everybody and to your probation officer, and you lied to me today on the stand. I can't accept somebody like that on probation.

Until you learn --

MR. PERKINS: I --

THE COURT: Don't talk. You have had your chance.

So I am committing you to the department of corrections and you are hereby sentenced to a term of not less than fifteen and not more than twenty on each of the five counts of unlawful sale of narcotics.

Those counts are to be served concurrently. That is, the first five counts on unlawful sale of narcotics. That means you will have to do a five year flat term to get rid of those five counts.

How you behave yourself will depend on how you get along over there. Then on the three counts of -- two counts of unlawful transportation, I am going to sentence you to fifteen to twenty on each one of those to be served concurrently, but those two terms shall then follow consecutively on the first five, so you are going

C E R T I F I C A T E

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

I, Joseph A. Trujillo, do hereby certify that as Official Court Reporter in the Superior Court of Pima County, Arizona, I was present at the hearing of the foregoing entitled case; that while there I took down in shorthand all the oral testimony adduced and proceedings had; that I have transcribed such shorthand into typewriting and that the foregoing typewritten matter contai: a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.

Court Reporter.